E COPY

Office-Supreme Court, U.S.
FILED
JAN 12 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 765

WILSON AND CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, BELL SYSTEM ASSOCIATED COMPANIES, AND WESTERN UNION TELEGRAPH COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT THE WESTERN UNION TELEGRAPH COMPANY

JOHN H. WATERS,
HERBERT G. TELSEY,
60 Hudson Street,
New York, N. Y. 10013,

WILLIAM A. McSWAIN,
38 South Dearborn Street,
Chicago, Illinois 60603,
Attorneys for Respondent,

The Western Union Telegraph Company.

INDEX

PAGE

Argument

POINT I—No federal question is presented as to the decisional procedure followed by the Federal Communications Commission 1

POINT II—No federal question is presented as to the notice given by the Federal Communications Commission 4

POINT III—The determination below is not in conflict with another determination 7

Conclusion 9

TABLE OF CITATIONS

Cases:

Hill v. *FPC*, 335 F. 2d 355 (5 Cir. 1964) 7, 8

Hotch v. *U. S.*, 212 F. 2d 280 (9 Cir. 1954) 6

Morgan v. *U. S.*, 298 U. S. 468 (1936) 2, 7

Morgan v. *U. S.*, 304 U. S. 1 (1938) 3, 4, 7

U. S. v. *Hansson, Inc.*, 296 F. 2d 779 (Pat. App. 1960), *cert. den.* 368 U. S. 899 6

U. S. v. *Pierce Auto Freight Lines*, 327 U. S. 515 (1946) 7

U. S. v. *Tucker Truck Lines*, 344 U. S. 33 (1952) 6

Statutes:

Administrative Procedure Act—Act of June 11, 1946, c. 324:

§ 4 (a), 60 Stat. 239, 5 U.S.C. § 1003 (a) 4

§ 5, 60 Stat. 239, 5 U.S.C. § 1004 2

PAGE

Communications Act of 1934—Act of June 19, 1934, c. 652:

Title IV, § 409 (c) 48 Stat. 1096, as amended July 16, 1952, c. 879, § 16, 66 Stat. 721; 47 U.S.C. § 409 (c) 2

Judicial Review Act—Act of December 29, 1950, c. 1189:

§ 7 (a), 64 Stat. 1130, 5 U.S.C. § 1037 (a) 4

Miscellaneous:

Committee on Interstate and Foreign Commerce, House of Representatives, Hearings on H. R. 14, 87th Cong., 1st Sess. (1961) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 765

WILSON AND CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, BELL SYSTEM ASSOCIATED COMPANIES, AND WESTERN UNION TELEGRAPH COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT THE WESTERN UNION TELEGRAPH COMPANY

POINT I

No federal question is presented as to the decisional procedure followed by the Federal Communications Commission.

The petitioners object to the dual participation—which is quite customary*—of the F.C.C. Common Carrier

---

* Cf. Statement of Newton C. Minow before the Committee on Interstate and Foreign Commerce, House of Representatives, on June 9, 1961 in hearings on H. R. 14, the proposed Independent Regulatory Agencies Act of 1961, especially at pp. 142-143.

Bureau in both the rate hearings and the formulation of the initial and final rate decisions. Such procedure is not contrary to any existing statute. Section 5 of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. § 1004, and Section 409 (c) of the Communications Act, 48 Stat. 1096 (as amended July 16, 1952, 66 Stat. 721), 47 U.S.C. § 409 (c), taken together, require separation of staff functions only in adjudicatory rate cases, such as reparation cases commenced by individual complainants for their individual benefit, or other adjudication.

Petitioners appear to rely partly on abstract underlying principles of fairness and procedural due process, realizing fully the broad scope and effect of so doing. (Petition, p. 11, third paragraph.)

In this generalized part of their argument they in substance assert supposed rights of the communications carriers, which the carriers have never themselves deemed infringed. Even if some combination of functions, or some collaboration among FCC employees or members in the formulation of the rate orders, were so improper as to deny procedural due process to someone it would have been the regulated carriers, not the petitioners, to whom the process would have been denied. The petitioners became parties only after the release of the initial decision.

In the first *Morgan* case, 298 U. S. 468, 481 (1936), this Court pointed out that procedural due process in administrative hearings does not preclude practicable aid of assistants. While petitioners refer to the Common Carrier Bureau of the FCC as prosecutors herein, the FCC was not contending that private line rates were too high or too low or otherwise improper. It was only Western Union which had taken a position in that regard. The agency was indeed conducting a rate inquiry, but not at any time advocating any specific result.

The FCC has manifold responsibilities. Television and radio broadcasting are probably the fields of FCC concern best known to the public, but telegraph rate-making is also the FCC's responsibility. It is a highly specialized and complex field. The Common Carrier Bureau is therefore expected to have especial competence in matters arising under Title II of the Communications Act. If not permitted to participate in the formulation of rate decisions, it would lose much of its especial value. Under existing law it may participate therein by the same personnel who took active part in the rate hearings. Arguably, such personnel are the best qualified to participate in formulating the decision. They represent the public interest, in any event. They cannot be partisan in a real sense.

If changes are to be made in the basics, they should be made by Congress, after full hearings. At a Congressional hearing in 1961, FCC Chairman Minow in his statement noted at p. 1, *supra*, explained that staff participation in rate hearings ensures full and adequate inquiry—which the regulated parties, if left to themselves, might not achieve—and that subsequent isolation of the Commission from its staff of experts at the decisional level in rate cases would tend to sterilize and hamper the whole process of rate-making and would require two duplicate common carrier staffs, one to participate in hearings and one to help formulate decisions.

If the second *Morgan* case, 304 U. S. 1 (1938), were relevant, the regulated carriers (not the petitioners) would have had some complaint about lack of opportunity to present their case or arguments fully to the Commission.

They have never voiced any such complaint. It is difficult to see how they could have. They had full opportunity to participate in the hearings, to submit proposed findings and conclusions and briefs in support thereof, to except to the initial decision and support their exceptions by briefs and oral argument, and to answer the exceptions

of others. They made use of all these procedural safeguards.

In the *Morgan* case it was not even contended that the authorship of the administrative order was what rendered it vulnerable (304 U. S. at p. 8).

Moreover, the petitioners, sensitive though they are to procedural requirements, did not mention their present procedural objections in their petition for review filed in the Court of Appeals, but only in their revised brief. The affidavit upon which they now rely forms no part of the statutory record for review as specified in Section 7 (a) of the Judicial Review Act, 64 Stat. 1130, 5 U.S.C. § 1037 (a), quoted below. Their late discovery of how communications rate decisions are formulated apparently came too late to enable their present objection to be properly raised below. The aforementioned statute provides:

> "Petitions to review . . . shall be heard in the court of appeals upon the record of the pleadings, evidence adduced, and proceedings before the agency . . ."

An affidavit (Petition, App. D., p. 44) filed by an FCC employee in the Court of Appeals does not answer the statutory description. Arguably, the Court of Appeals had no authority to receive it or to consider it as if it were part of the agency record.

POINT II

No federal question is presented as to the notice given by the Federal Communications Commission.

Under Section 4 (a) of the Administrative Procedure Act, 60 Stat. 239, 5 U.S.C. § 1003 (a), quoted below, no Federal Register notice was required by law to be published. The telephone companies and the telegraph company were otherwise cognizant of the institution and scope

of the formal investigation of private line rates. The publications made were accordingly optional, rather than essential to the validity of the rate orders eventually made.

The statute provides:

> (a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law). . . .

It is not disputed that the communications carriers, who were the only parties to the proceeding subject to the regulatory jurisdiction of the FCC, were named in and served with the instituting order (Petitioners' Appendix, Vol. I., p. 343). They attended a prehearing conference. Assuredly, they did not depend upon the Federal Register (20 F. R. 8128, 8342; 21 F. R. 1614, 6961, 7810; 22 F. R. 6663, etc.) to make them aware of the rate investigation.

The petitioners doubtless interpret the statutory words "all persons subject thereto" as including rate payers, who are "subject" to a rate order only indirectly, since it establishes a rate which the carrier must necessarily charge for the service. That construction is strained and unrealistic, and would render meaningless the parenthetical exception in the quoted statutory language.

Nor is it readily apparent even upon abstract principle why, let us say, every customer of the Bell Telephone network should receive notice of every proposed rate prescription as a condition to its legal validity. The overwhelming numerical majority of such customers are neither equipped, financially or otherwise, to take part in a rate case, or in any degree interested in so doing.

It is different when the direct coercive effect of proposed rule-making would be felt by members of the public. Then,

the affected public is entitled to advance notice. *Hotch* v. *U. S.*, 212 F. 2d 280 (9 Cir. 1954).

The notice point was not urged by the petitioners before the FCC. Although they intervened for the purpose of excepting to the initial decision, argued their exceptions orally, and sought rehearing and reconsideration of the final FCC order, they did not raise the notice point until they filed their petition for judicial review. Then, it was too late. *U. S.* v. *Tucker Truck Lines*, 344 U. S. 33 (1952); *U. S.* v. *Hansson, Inc.*, 296 F. 2d 779 (Pat. App. 1960), *cert. den.* 368 U. S. 899.

Finally, the notice was not defective in any event. Petitioners merely argue that it was too broad, not that it failed to cover the ground.

The petitioners seem to believe that the established mechanics for excepting to an FCC initial decision and seeking rehearing or reconsideration of a final order are legally insufficient, and that there must also be engrafted or superimposed some further procedure involving notice of the proposed terms of the initial decision, to be given prior to its release. Presumably they believe exceptions thereto should also be permitted. In effect, they would object to an initial decision before its issuance rather than after.

Even if the Commission were to adopt such novel procedure, it would serve no purpose. A proposed initial decision could not be promulgated until after the close of the hearings. It could not be formulated before all evidence had been taken. But once the hearings have ended, there is no need to add another step to the decision-making process. Exceptions to the initial decision may be filed, and petitioners filed theirs. Oral argument may be requested, and petitioners argued. Upon the coming down of the final decision, reconsideration may be sought, and petitioners sought it. Due process at the agency level

hardly requires any further gradation in the scheme of rule-making. Nor has Congress provided for it.

It may be added, parenthetically, that neither the telegraph company nor (so far as it knows) the telephone companies sought the prescription that private line telegraph service be offered exclusively on a 24-hour, 7-day basis. Unlike the petitioners, Western Union recognizes that the Commission acted lawfully, in no wise exceeding its statutory powers, in making the directions it made. Moreover, the communications carriers recognize, as they must, that the Commission was not bound to announce in advance what rate prescriptions it would make in the initial decision. It is clear, in any event, that the presence of an unanticipated determination, the potentiality of which existed *ab initio,* is not a valid objection. *U. S.* v. *Pierce Auto Freight Lines,* 327 U. S. 515 (1946).

POINT III

The determination below is not in conflict with another determination.

The two *Morgan* cases have been discussed under Point I.

There was present here no "Sangamon situation," in which persons outside the agency seek to influence, *ex parte,* the outcome of a contest for a valuable privilege.

Contrary to the Petition (p. 15), no conflict exists with the decision of the Court of Appeals for the Fifth Circuit in *Hill* v. *FPC,* 335 F. 2d 355 (1964). As stated by Judge Brown, the question in that case was whether the Federal Power Commission could lawfully establish standards of proof to be met by a utility in a rate case, for the first time, in the very decision holding that such standards had not been met. An attempt was clearly made by the Power Commission to lay down regulatory rules of substance, retroactively.

The criterion of cost justification to support different charges for like communications service was not established by the FCC for the first time in this matter. It is a standard of communications rate-making well known in the industry (Cf. Petitioners' Appendix, Vol. I, p. 132). No element of surprise, nor any hint of retroactivity, was involved in the Commission's adherence thereto in this matter.

The rationale of the *Hill* decision is that the utility should be given a procedural opportunity to meet its burden of proof regarding its rate base (335 F. 2d at p. 363). As the court there pointed out, in more traditional rate inquiries such as the one involved here, "the criteria will have long been established . . .". The *Hill* court was recognizing that natural gas producer regulation is largely *sui generis*. This is, by now, a well-known fact. The two-step hearing procedure referred to in the Petition (p. 17) was suggested by that court as a possible means of coping with the "undulating" regulatory problem just mentioned.

The petitioners do not relish the fact that a long-standing rate pattern, advantageous to them, was upset. That is understandable. Their effort to demonstrate that they enjoyed some type of vested property right in the old rate pattern is not.

Their reliance upon the due process clause of the Fifth Amendment is not merely misplaced, but is also significantly indicative of their misunderstanding of the regulatory principle involved. The Commission clearly did no more than to prescribe that private line telegraph users should be charged the full costs of the service they use. The Petition (p. 4) characterizes this FCC action as compelling patrons to pay for service they do not want. It compels them only to pay an adequate, rather than an inadequate, rate for the service they do want.

In *Hill* a utility was not told what it must prove to satisfy the Power Commission that its proposed rate increase

was justified. The court there held that it had not been afforded a fair and adequate hearing in regard to the proposed rate. Herein, full and general proof was made by the utilities over a period of years, on the basis of which the FCC determined, *inter alia,* that rates lower than full-time rates, for less than full-time service, were discriminatory. Although charges were lower and hours of service were shorter, the costs were found not different from those of full-time service. The Commission therefore ordered that only full-time private line telegraph service be offered to the public in future. The petitioners thereupon intervened, filed and argued exceptions, sought rehearing, reviewed the order in the Court of Appeals, and now seek further review here. In all these proceedings, their essential quarrel has been with the Commission's regulatory judgment. They have sought, but in vain, to express it in terms of the Commission's power.

Conclusion

If the Court of Appeals strayed in any direction, it was in the direction of over-indulging the petitioners. They obtained drastic injunctive relief pending the determination of their petition for review, to the damage of Western Union. Private line telephone users were also damaged, as indicated by the Government when this matter was last here (October Term, 1963, No. 711). Petitioners were permitted to withdraw their brief on the merits and write a new one dealing with the issue of Common Carrier Bureau functions—thus protracting the review proceeding and the life of the injunction.

The petitioners depend upon essentially hollow arguments. They also ask too much of this Court, seeking to have it step into the shoes of the Congress and dictate sweeping revisions in standards of procedure for rate cases handled by the principal regulatory agencies.

The Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit presents no persuasive reason for the exercise of this Court's discretionary jurisdiction; indeed no federal question is revealed. The petition should be denied.

Respectfully submitted,

JOHN H. WATERS,
HERBERT G. TELSEY,
60 Hudson Street,
New York, N. Y. 10013,

WILLIAM A. McSWAIN,
38 South Dearborn Street,
Chicago, Illinois 60603,

Attorneys for Respondent,
The Western Union Telegraph Company.